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Via Email to rule-comments@sec.gov

Ms. Vanessa Countryman
Secretary
Mrs. Martha L. Miller
Advocate for Small Business Capital Formation
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Release Nos. 33-10734; 34-87784; File No. S7-25-19
Amending the "Accredited Investor" Definition

Dear Ms. Countryman and Mrs. Miller,

OpenDeal Inc. (collectively with its subsidiaries, "Republic") respectfully submits this letter in response to the request for comment by the Securities and Exchange Commission (the "Commission"), on its Amending the "Accredited Investor" Definition release, File No. S7-25-19 (the "Release"). We thank the Commission for its efforts in publishing the Release and the opportunity to provide our comments. We believe that the new proposed categories of "Accredited Investors" with respect to certain individuals are (i) too narrowly tailored and prescriptive and (ii) will prove ineffective at expanding access to the capital markets. We believe that adopting a principles-based approach to assessing certain factors of an individual's sophistication and ability to tolerate risk will expand the definition of "Accredited Investor" in the manner Congress originally intended, and allow the Commission to avoid the above mentioned oversights, without creating undue risk of an over-expansion of eligible persons.

I. Republic's business with respect to actual and prospective Accredited Investors

As a family of companies that includes a registered crowdfunding portal, a registered broker-dealer and an exempt reporting adviser, Republic facilitates transactions for and with "Accredited Investors" in the context of numerous exempt-from-registration offering types. Republic supports the Commission's stated interest in updating and improving the definition of "Accredited Investor" in order to more effectively identify institutional and individual investors that have the knowledge and expertise to participate in unregistered private capital markets transactions without need for the additional protections of registration under the Securities Act of 1933, as amended (the "Securities Act"). Republic has been a mission-driven organization since its inception, with a focus on supporting companies founded by female, minority, veteran, immigrant and other entrepreneurs underserved by traditional venture financing – over 50% of the capital deployed through Republic's crowdfunding platform has supported underrepresented founders and we expect this level of support to continue for the foreseeable future; key to this mission is attracting investors, both accredited and un-accredited, to Republic's platform to support these companies. While providing these services, Republic has interacted with investors of all levels of sophistication – this experience, within the context of Regulation Crowdfunding ("Regulation CF") specifically, suggests the Commission can responsibly allow a broader cross-section of investors to hold an economic interest in companies utilizing registration exemptions only available to those currently classified as Accredited Investors. Prior to the JOBS Act of 2012's passage, the majority of American's could not invest in private companies, whether

due to their accreditation status or their lack of connections to founders and opportunities. Recent studies have shown private companies go public later, or never go public, resulting in the majority of Americans being excluded from possible substantial returns on investment, only open to those early stage investors that are generally accredited or company insiders. While the Commission has taken great strides in last few years to expand access to private offerings[1], the slow growth of Regulation CF and Regulation A+, coupled with the continual reliance on financial thresholds to determine individual's accreditation status, has unduly restricted access to investment opportunities to those who have the knowledge and experience necessary to bear the risk, balance the merits and make an educated decision with respect to their capital allocations.

In considering the types of investors that should qualify as "Accredited Investors", we are supportive of expanding the definition to allow individuals to qualify based on measures of sophistication other than annual income and net worth. As discussed in our previous letter to the Commission, submitted in response to the Concept Release[2], in operating our crowdfunding platform, Republic has encountered numerous examples of investors who would not meet the annual income or net worth tests which are used in place of other manners of demonstrating high levels of financial literacy and sophistication. In particular, the communications channels Republic's platform hosts often reveal non-accredited investors asking issuers insightful and often complex questions about their businesses, competitors, financial statements and offering documentation and then making or withdrawing their investment commitments based on analysis of the foregoing. While we believe that these types of engaged investors are able to fend for themselves and should qualify as "accredited", we recognize the need for objective standards coupled with thoughtful guidance from the Commission to help issuers identify and verify those that should qualify. Reviewing the history of the definition of an "Accredited Investor"; before the adoption of Regulation D, Rule 146 permitted offers and sales only to persons the issuer reasonably believed had the requisite knowledge and experience in financial matters to evaluate the risks and merits of the prospective investment or who could bear the economic risk of the investment. Seeking to provide more objective standards, the Small Business Investment Incentive Act of 1980[3] through the addition of Section 2(a)(15)(ii) to the Securities Act, authorized the Commission to adopt additional categories based on "such factors as financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under management" other than those enumerated by Section 2(a)(15)(i). We wish to highlight the Commission's acknowledgment that the "Accredited Investor" definition is "intended to encompass those persons whose financial sophistication and ability to sustain the risk of loss of investment ***or*** fend for themselves render the protections of the Securities Act's registration process unnecessary."[4] As noted in the Release "[t]he characteristics of an investor encompassed within this standard can be demonstrated in a variety of ways. These include the ability to assess an investment opportunity—which includes the ability to analyze the risks and rewards, the capacity to allocate investments in such a way as to mitigate or avoid risks of unsustainable loss, or the ability to gain access to information about an issuer or about an investment opportunity—or the ability to bear the risk of a loss."[5] We acknowledge that the Concept Proposals the

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[1] This Letter is cognizant and appreciative of the Commission's Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets Release Nos. 33-10763; 34-88321; File No. S7-05-20 ("Concept Proposals") and Republic intends to provide comments on the Concept Proposals separately to this letter.

[2] Concept Release on Harmonization of Securities Offering Exemptions, Release No. 33-10649 (June 26, 2019) ("Concept Release"). Republic's response to the Concept Release can be found at https://www.sec.gov/comments/s7-08-19/s70819-6189775-192417.pdf.

[3] Pub. L. No. 96-477, 94 Stat. 2275 (1980).

[4] Regulation D Revisions; Exemption for Certain Employee Benefit Plans, Release No. 33-6683 (Jan. 16, 1987) [52 FR 3015 (Jan. 30, 1987)]. See also SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953) (taking the position that the availability of the Section 4(a)(2) exemption "should turn on whether the particular class of persons affected needs the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction 'not involving any public offering.'"). Emphasis added by drafter.

[5] Release at 16.

Commission recently released may encourage more companies to utilize offering exemptions generally open to both accredited and unaccredited investors (without specific limitations on the number of participants), but as Regulation D offerings historically make up the largest capital market, whether public or private, this *possible* shift may take years to be achieved, if it is ever realized.

II. Observations with respect to proposed changes to the definition of Accredited Investor

Accordingly, we recommend over the summer of 2019, in our response to the Concept Release, that the Commission modify the definition of "Accredited Investor" to include individuals who hold relevant professional credentials (*e.g.*, FINRA licenses, CFA certification or specific graduate degrees in business, finance, economics or law). The Release did this, to an extent, proposing that those with specific FINRA licenses will be considered accredited by nature of their work and the sophistication it suggests, but only during the time they hold these licenses. The Commission stated that the " . . . proposed new categories would apply additional markets of financial sophistication for natural persons based on professional knowledge and experience."[6] We believe that the new categories are (i) too narrowly tailored and prescriptive and (ii) will prove ineffective at expanding access to the capital markets for those able to fend for themselves due to the Commission's proposed verification requirements, as further explained below. The Commission's own economic analysis states that "[a]llowing more investors to invest in unregistered securities offerings of private firms thus may allow them to participate in the high-growth stages of the firm"[7] and Republic, as a platform aimed at democratizing access to capital, believes this lost opportunity is largely to the disadvantage of investors.

While a novel and appreciated expansion of the definition, the proposed changes with respect to individuals do not significantly expand access to private offerings to the public (specifically to offerings only open to Accredited Investors), as the Release estimates, less than 750,000 individuals are expected to benefit from this change, and many of them are likely already accredited investors due to the high salaries paid in banking and financial services jobs. As Scott Purcell, the CEO and Chief Trust Officer of Prime Trust, a larger private placement-focused escrow agent, remarked when reviewing the proposal " . .. many (perhaps most) of those people are already accredited per financial determinations anyhow. And those who aren't will likely be prevented by their firms and by FINRA rules from participating in most of these types of investments. . . In summary, some nice cleanups but overall it's much ado about nothing and does not achieve the public interests of enhancing capital formation or enabling more of the middle class to participate in private markets." Republic, as the employer of registered representatives, associated persons and those providing investment advice, is well aware of the need to avoid conflicts of interest with respect to our representatives and the clients that utilize the Republic platform; therefore, even as a small platform, with less than 60 employees, there is a general prohibition for those who work and make decisions that could affect investors, from having a financial interest in any issuer utilizing or considering utilizing the platform; therefore those persons not currently accredited due to their income or net-worth, but possibly qualifying due to their FINRA licenses, would likely be "conflicted out" of utilizing the expanded definition with respect to the majority of their proposed investments. One may suggest that once these licensed professionals leave the industry, they will be able to be grandfathered in to the definition due to their previous profession – this ignores the fact that FINRA licenses generally expire if un-used for two years[8], meaning those no longer conflicted out, will soon lose their status if they have not gained sufficient wealth during their time working in the capital markets, creating an odd paradigm, where the desire to gain wealth will be critical to being

[6] *Id*. at 21

[7] The Release at 120.

[8] Requirements for Examination on Lapse of Registration; Effective October 1, 2018 FINRA Registration Requirements Rule 1210; FINRA Registration Requirements 1210.08 - Lapse of Registration and Expiration of SIE"

able to continue to participate in the capital markets these persons act as gatekeepers and facilitators of, possibly in conflict with their fiduciary duties or the soon to be enacted Regulation Best Interest.[9]

We also note that the Commission seems to have overlooked those persons who have only passed FINRA's securities industry essentials (SIE) exam[10], as well as Certified Public Accounts (CPAs), Lawyers, Chartered Financial Analysts (CFAs), and those who are educators in economics, business and the like, at accredited educational institutions, due to the standards the Release sets for a qualifying license under the proposed rule. All of these persons could reasonably meet the Commission's proposed test for qualifying under the proposed category *provided* small adjustments are made:

> (1) All of the persons mentioned above could show an issuer their certification, designation, or credential arises out of an examination or series of examinations administered by a self-regulatory organization or other industry body or is issued by an accredited educational institution;
> (2) CFAs and certain educators could prove the examination or series of examinations they have taken were designed to reliably and validly demonstrate an individual's comprehension and sophistication in the areas of securities and investing this component, but CPAs and attorneys may need special dispensation as most state-Bar examinations and certified public accounting exams are not specific to investing and securities (see further below);
> (3) all persons mentioned above can reasonably be expected to have sufficient knowledge and experience in financial and business matters to evaluate the merits and risks of a prospective investment *provided* those without investment and finance specific licenses, such as attorneys, could prove their participation in relevant industry to qualify; and
> (4) and all categories of persons mentioned above possess licenses or credentials that can be verified through publicly available information, as posted by relevant self-regulatory organizations or other industry bodies.
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> The small tweaks above to the test the Commission proposed would provide a more reasonable standards for the new class of "Accredited Investor", if amended, as discussed further below.

III. Recommendations to broaden access to the private markets through a principles based approach

We believe the Release is too narrowly tailored and prescriptive; while the Release noted the value of these certifications, designations and credentials being publicly verifiable, this requirement is unique and has no parallel for issuers under Regulation D or other registration exemptions – the Commission should look to a *principles-based* approach. Under Rule 506(b), issuers must rely on private representations of sophistication from investors, without the need to find public sources to confirm such representations; under Tier 2 of Regulation A, issuers may rely on representations from investors as to their net-worth and income, without needing to find or receive public verification of such. Under Rule 506(c), issuers must take reasonable steps, generally using non-public information sources, to verify assets and income representations – providing issuer's a safe harbor and examples of reasonable steps to meet the safe harbor, such as in Rule 506(c)'s adopting release, would provide the necessary flexibility.[11] The Commission previously stated that under a " . . . principles-based approach, issuers would consider a number of factors when determining the reasonableness of the steps to verify that a purchaser is an accredited investor, such as: (i) the nature of the purchaser and the type of accredited investor that the purchaser claims to be; (ii) the amount and type of information that the issuer has about the purchaser; and (iii) the nature of the offering,

[9] See Regulation Best Interest, Release No. 34– 83062 (Apr. 18, 2018).
[10] Unlike the FINRA licenses endorsed in the Release, the SIE does not require a FINRA member to sponsor the exam, meaning a unnecessary barrier to entry could be eliminated.
[11] *See* Release No. 33-9415; No. 34-69959; No. IA-3624; File No. S7-07-12.

such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as a minimum investment amount.[12] These same factors could be applied to the sufficient knowledge requirement the Release outlines but too narrowly prescribed. For example, an issuer could confirm, through reasonable investigation, that a CPA largely serves as an auditor for filings with the Commission, or that a CFA is an executive at an investment bank or that a licensed attorney practices before the Commission in administrative hearings, all suggesting the level of knowledge and sophistication necessary to meet the law's spirit and standards.

With the proposed addition of *knowledgeable employees* of private funds to the definition, we are wholly supportive and only ask that the Commission ensure that those principals and knowledgeable employees of investment advisers that advise private funds (which may or may not be such fund's sponsor), whether such advisors are registered or exempt from registration, also be included in the expanded "Accredited Investor" definition. If an individual is considered competent to direct others' investments, they too should be able to invest in what they deem within their risk appetite. We believe this aligns nicely with the Commission's proposal to also include, by default, all federally Registered Investment Advisers and those similarly registered with the states. We believe this definition should be extended to exempt reporting advisers (ERAs) – as many are highly sophisticated operations, such as AngelList Advisors.

In addition, we believe that those holding a financial interest in an issuer, so long as such interest was permissibly acquired, should retain grandfathered "accredited" status with respect to future offerings of such issuer's securities to provide protection from investment dilution or for legal impossibilities arising whereby an investor has participation rights in future offerings, but their participation may ruin the registration exemption of the offering if Section 4(a)(2) cannot be relied upon. Additionally, we believe that the Regulation CF investment limits for Accredited Investors, under the new standards outlined and proposed above, should be eliminated. In discussing this topic in the Adopting Release for Regulation CF, the Commission expressed its view that "crowdfunding transactions were intended under Section 4(a)(6) to be available equally to all types of investors" and noted that "issuers can rely on other exemptions to offer and sell securities to accredited investors and institutional investors."[13] By artificially limited natural persons' investment amounts in a regulated offering, such investors are pushed away from Regulation CF and towards other exempt offering types with less rigorous (or no) substantive disclosure obligations or oversight; which we believe is counterproductive from an investor protection standpoint. We note that the Commission made a similar rule recommendation in the Concept Proposals and we will restate our support in a response to such.

IV. Implications on Section 12(g) of the Exchange Act

Under the existing framework, non-reporting issuers must analyze their net-assets and holders of record at each fiscal year to determine whether each are above thresholds that would trigger registration and reporting under Section 12(g) of the Securities Exchange Act of 1934, as amended ("Section 12(g)" of the "Exchange Act").[14] Securities issued pursuant to Regulation A+ and Regulation CF are conditionally exempted from the record holder count, if certain conditions are met.[15] For example, Section 12(g) registration of equity securities issued pursuant to Regulation CF is required if, on the last day of its fiscal year, an issuer has total assets greater than $25 million and the class of equity securities is "held of record" by 2,000 persons or 500 persons who are not accredited investors. In the Proposing Release for Regulation CF, the Commission suggested permanently exempting securities issued pursuant to Regulation CF, expressing its belief that "the size of the issuer should not affect the availability of the

[12] *Id*. at 20.
[13] *See* Release No. 33-9974 (Oct. 30, 2015), at 28.
[14] Rule 12(g)-1(b)(1) under the Exchange Act.
[15]

exemption because conditioning the exemption on the issuer not exceeding a certain amount of total assets would impose an additional burden on successful issuers that unsuccessful issuers would not face, which in turn would discourage growth."[16] However, the Commission ultimately adopted Rule 12g-6 of the Exchange Act with the $25 million total asset test and other conditions described above. With respect to Regulation A, Tier 2 issuers, the Commission ultimately adopted a split conditional exemption, much like Regulation CF, Tier 2 issuers must be current in their required reporting and utilize a registered transfer agent but must have (i) had a public float of less than $75 million as of the last business day of its most recently completed semiannual period, or, (ii) in the absence of a public float, had annual revenues of less than $50 million as of its most recently completed fiscal year.[17]

Over the summer, we recommend that the Commission eliminate the total asset test from Rule 12g-6. As the Commission noted in the Adopting Release for Regulation CF, "[c]rowdfunding contemplates the issuance of securities to a large number of holders, which could increase the likelihood that Section 4(a)(6) issuers would exceed the thresholds for triggering reporting obligations under Section 12(g)."[18] In our experience, Regulation CF, and Regulation A+ issuers and intermediaries servicing them typically do not take steps to determine the accreditation status of investors at all (save self-accreditation under some Tier 2 investment opportunities), let alone on an annual basis, and many Regulation A+ and Regulation CF offerings have more than 500 participants[19]. Taken together, the current rules mean that successful and fast-growing Regulation CF and Regulation A+ issuers may face compelled registration under Section 12(g) much earlier in their lifecycles than they otherwise would. This risk is not lost on potential issuers and represents another common reason that companies forgo conducting Regulation A+ and Regulation CF offerings. We believe that such an outcome directly contradicts the intention of the JOBS Act to encourage broad investor bases. Further, the requirement to assess the status of investors at the end of each fiscal year is too costly and speculative to be a reliable exercise for issuers to determine their status under Section 12(g). Therefore, we encourage the Commission to look to ways to provide additional "space" for issuers utilizing both exemptions, to avoid costly registration under the Exchange Act early in a company's lifecycle, likely by increasing the asset, revenue and float thresholds.

Finally, in implementing any changes to the definition of "Accredited Investor", we recommend that the Commission retain the current annual income and net worth tests for accreditation as we believe that they remain relevant measures of sophistication and ability to sustain risk of loss. We also believe that any modification thereto would be highly disruptive. Similarly, we recommend that the Commission align the definition of accredited investor under the Securities Act with the equivalent definitions under the Investment Company Act, as there is no reasonable policy rational for the slightly different standards, which contribute mostly to confusion or the exclusion of those who can fend for themselves from participation. We support aligning Rules 501(a) and 215, as the inconsistency can cause confusion amongst industry participants and inadvertently exclude parties that can bear the risk of their investments. Further we recommend that the Commission require FINRA to align the definition of "accredited investor" set forth in FINRA Rule 5123 with the Rule 501 definition as we disagree with the assertion that the annual income and net worth tests for accreditation are insufficient to justify exemption from the FINRA rule. Notably, the Release also added to the accredited investor definition the term "spousal equivalent," defined to mean a cohabitant occupying a relationship generally equivalent to that of a spouse, so that spousal equivalents may pool finances for the purpose of qualifying as accredited investors under Rule 501(a)(5) and (6) but did not propose any changes to the definition's financial thresholds. The Release did, however, include a request for feedback on possible adjustments to the financial thresholds in the definition. We believe that

[16] *See* Release No. 33-9470 (Oct. 23, 2013), at 278.

[17] 17 CFR 240.12g5-1(a)(7)

[18] *See* Release No. 33-9974 (Oct. 30, 2015), at 328-329.

[19] Should the Concept Proposals be implemented and portals more actively accredit certain investors, we don't believe this changes the substance of the analysis herein.

the possible harm to the current private capital markets that could be incurred by raising the net-worth and income requirements under Rule 501 to 2019 or 2020 inflation standards would significantly stifle investment, innovation and job growth. Finally, expanding the pool of "Accredited Investors" could also reduce the liquidity discount that frequently is levied on restricted securities sold permissibly under Rule 144, Section 4(a)(1) and Section 4(a)(7), promoting a rather unused registration exemption for secondary transactions amongst certain parties.

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We appreciate the opportunity to comment on the Release and would be pleased to discuss our comments or any questions the Commission or its Staff may have.

Sincerely,

Maxwell R. Rich
Deputy General Counsel & Corporate Secretary

cc: Kendrick Nguyen
Jed Halfon
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